STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUCLIDE RICHARD MAILLOUX,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 195998
Recorder's Court
LC No. 95-009898

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by jury of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment with respect to the felony-firearm conviction to be followed by a term of four to forty-eight months with respect to the felonious assault conviction. He now appeals as of right. We affirm.

Detroit police officers knocked on the door of defendant's home to investigate allegations that a white male at defendant's address had fired a rifle at a nine-year-old boy on or near the premises. The officers noted that an upstairs window of the home was broken in a manner consistent with it having been shot out. When defendant, who is a white male, answered the door and realized that it was the police, he cursed and slammed the door. He refused to leave the house or allow officers to enter. Eventually, a friend of defendant persuaded defendant to come out of the house. Defendant was placed under arrest. The officers then swept the home to determine whether any other individual fitting the description of the suspect was there and to ensure their own safety. While two young girls were in the house, no other white males were found. Police officers did, however, notice and seize a shotgun and a spent shotgun shell laying in the open in an upstairs room.

Prior to trial, defendant brought a motion in limine to suppress the shotgun and shotgun shell, arguing that the officers had no search warrant to search his home and that none of the exceptions to the search warrant applied. The prosecution countered that exigent circumstances excused the failure of the officers to obtain a search warrant. The court refused to suppress the evidence, reasoning that exigent

circumstances existed in light of the assaultive nature of defendant's alleged conduct and the officers reasonable fear of danger to themselves and to others. The court also mentioned that the evidence had been in plain view in that it had not been hidden in a closet or the like. Defendant was then tried and convicted of the crimes set forth above.

On appeal, defendant again argues that the shotgun and shotgun shell found on the second floor of his house should have been suppressed. Both the Michigan and United States constitutions guarantee the right to be free from unreasonable searches and seizures. Const 1963, art 1, § 11; US Const, Am IV. A search conducted without a warrant is presumed to be unreasonable unless there exists both probable cause[1] and circumstances satisfying an established exception to the search warrant requirement. *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). Here, the trial court concluded that the exigent circumstances exception to the warrant requirement applied and excused the failure of the officers to first obtain a warrant. Under the exigent circumstances exception, the police must, in addition to establishing probable cause, prove the existence of an actual emergency supported by specific and objective facts revealing the necessity of immediate action either to either prevent the imminent destruction of evidence, protect the officers or others, or prevent the escape of a suspect. *People v Blasius*, 435 Mich 573, 593-594; 459 NW2d 906 (1990).

Defendant's constitutional rights to be free from unreasonable searches and seizures was not impinged upon. As was the case in the recent decision of *People v Cartwright*, ___ Mich ___; ___ NW2d ___ (Docket No. 106502, issued 6/3/97) slip op p 13, the instant protective sweep "was not a full search, but rather a cursory inspection of areas where a person presenting a danger to officers might be found." While defendant fit the description of the man who had fired the rifle, it was unclear whether he was, in fact, the suspect, or whether that dangerous individual remained in the house. The minimal intrusion suffered by defendant was substantially outweighed by the governmental interest in ensuring that the lives of the police officers were not in jeopardy. *Id*. Finally, because the officers were justified in conducting the protective sweep, they were justified in seizing the shotgun and shotgun shell, which were not concealed but located in plain view. See *Harris v United States*, 390 US 234, 236; 88 S Ct 992, 993; 19 L Ed 2d 1067 (1968). Accordingly, we find no error in the introduction into evidence of the shotgun and shotgun shell.

Defendant also argues that he was denied a fair trial because the prosecution failed to exercise due diligence in identifying certain res gestae witnesses. Specifically, defendant argues that the prosecution failed to identify and locate two children who were playing with the complainant when defendant fired shots at them from his house. Defendant has not preserved this issue for appeal. Defendant failed to object at trial to the alleged failure to identify or list these witnesses, and defendant did not move for a new trial or a post-trial evidentiary hearing on this basis. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

Finally, defendant contends that the trial court erroneously denied his motion for new trial because the verdict was against the great weight of the evidence. A jury's verdict should not be set aside if there is competent evidence to support it. *King v Taylor Chrysler-Plymouth, Inc.*, 184 Mich App 204, 210; 457 NW2d 42 (1990). A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Harris*, 190 Mich App 652, 658, 659 (1991), lv den

439 Mich 996 (1992). An abuse of discretion is found "only where denial of the motion was manifestly against the clear weight of the evidence." *Id.* at 659.

In the instant case, defendant was convicted of felonious assault and felony-firearm. The elements of felonious assault are that the defendant committed an assault with a dangerous weapon with the intent to injure or to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felony-firearm are possession of a firearm during the commission or attempted commission of a felony. *Id*. Thus, we must consider the trial court's exercise of its discretion in the context of both the evidence presented and the elements of the crimes charged.

We conclude that the court did not abuse its discretion in denying defendant's motion for new trial. The complainant's father testified that defendant admitted to him that he shot at complainant. A police officer testified that a window at defendant's house had a hole in it that looked like a gunshot. Another officer testified that he found a shotgun and a spent casing in the upstairs bedroom of defendant's house, and that the gun smelled like it had just been fired. Defendant admitted to the police that he pointed the gun at the children to scare them. Therefore, competent evidence supported the verdict, *King*, *supra*, and, accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Harris*, *supra*.

Affirmed.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

[1] In the present case, defendant does not challenge that the police officers had probable cause to believe that a crime had been committed and probable cause to believe that the premised contained evidence of the crime. See *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d (1993). Therefore, we do not address this issue in the text of the opinion.